RECORD
AND
BRIEFS

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No. 10-1124

IN THE

Supreme Court of the United States

TURLOCK IRRIGATION DISTRICT,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner is filing this reply brief pursuant to Rule 15.6 of this Court in order to address a new point raised by Respondent FERC[1] and Respondent CAISO in their briefs (the "FERC Brief" and the "CAISO Brief," respectively) in opposition to the Petition for a Writ of Certiorari filed by Petitioner in the above-captioned case (the "Petition" or "Pet."). Petitioner hereby incorporates by reference the Question Presented (Pet. (i)) and the Statement of the Case set forth in the Petition (*id.* at pp. 2-10).

[1] Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the Petition.

ARGUMENT

By approving the IBAA proposal, FERC is unlawfully regulating the rates of Petitioner's wholesale sales of electricity through the CAISO markets, and not CAISO's transmission rates. Both FERC and CAISO attempt, in their respective briefs in opposition, to recast the rate at issue as a CAISO transmission rate in order to shift the focus of this case to FERC's jurisdiction over CAISO's transmission facilities. Petitioner herein clarifies why FERC's transmission jurisdiction is not implicated here.[2]

Petitioner explained that CAISO is "neither a seller nor a purchaser of power," and thus it is not CAISO's prices for the sale of wholesale electricity that FERC is regulating, but the Petitioner's. Pet. 15. FERC responded by asserting that it is in fact regulating CAISO's *transmission* rates. FERC Brief 9 ("The California ISO's Balancing Authority amendment to its Market Redesign Tariff, which the Commission approved here, calculates the locational marginal price that the *California ISO* charges petitioner for the use of the ISO's transmission grid within the ISO's electric market.") (emphasis in original). CAISO makes the same argument in its brief. CAISO Brief 6 ("Actually, the amendment affects *the ISO's rates for transmission*.") (emphasis in original).

Respondents' arguments implicitly recognize the strength of Petitioner's argument regarding FERC's lack of jurisdiction over Petitioner's wholesale sales of electricity. It is axiomatic that the transmission of

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[2] Petitioner does not dispute FERC's authority to regulate CAISO's transmission rates.

energy is a separate transaction from its sale,[3] and it is the latter that FERC is attempting to regulate in this case. *See Order Denying Rehearing*, 128 FERC ¶ 61,103 at P 25 (2009) (stating, "the Commission clarifies that the IBAA Proposal establishes only the rates, terms and conditions for sales in the CAISO's markets") (App. 233a).

A locational marginal price ("LMP"), which CAISO, with FERC's approval, purports to impose on Petitioner's sales through the IBAA Proposal, is a price for the wholesale sale of electricity "used as the market price to compensate generators."[4] The fact that the proposed price is calculated based on several variables, as set forth by CAISO in its Brief,[5] holds some academic interest, but is ultimately irrelevant to the jurisdictionally exempt status of Petitioner's sales.

Section 201(f) of the FPA, 16 U.S.C. § 824(f), makes plain that, absent a specific statutory provision to the contrary, wholesale sales by municipal utilities are exempt from FERC jurisdiction. Neither Section 205 of the FPA, 16 U.S.C. § 824d, on which FERC's decisions below rest, nor any other part of that statute contains any reference granting FERC jurisdic-

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[3] *See, e.g. Ala. Mun. Elec. Auth. v. Ala. Power Co.*, 119 FERC ¶ 61,286 at P 37 (2007) ("In Order No. 888, the Commission concluded that functional unbundling of wholesale power sales services was necessary to implement non-discriminatory open access wholesale transmission services, *i.e.*, it required public utilities to separate the transmission component of wholesale sales from the energy component of wholesale sales.").

[4] *See Demand Response Comp. in Organized Wholesale Mkts.*, 76 Fed. Reg. 16658 (Mar. 24, 2011), FERC Stats. & Regs. ¶ 31,322 at P 2, n.5.

[5] *See* CAISO Brief 2-3.

tion over Petitioner's sales and no such jurisdiction can be created by agency or court fiat,[6] whether or not Petitioner's sales are made through FERC-regulated markets, and irrespective of how the price for such sales is calculated. By approving CAISO's proposed LMP mechanism under the IBAA Proposal, which directly applies to Petitioner's sales, FERC effected a jurisdictional grab, which it unconvincingly attempts to justify through its authority over transmission.

Because FERC's jurisdiction over interstate transmission is not at issue in the instant case, the Respondents' reliance on *New York v. FERC*, 535 U.S. 1 (2002) (holding, *inter alia*, that FERC has jurisdiction over unbundled retail transmission) is inapposite. FERC Brief 10-11; CAISO Brief 5-6. It is, however, noteworthy that this Court decided *New York v. FERC* based on the same rationale that Petitioner urges it to adopt here. The Court focused on the "clear statutory language" of the FPA and ruled that *all* transmission, retail and wholesale, was subject to FERC jurisdiction, because "there is no language in the statute limiting FERC's *transmission* jurisdiction to the wholesale market, although the statute does limit FERC's *sale* jurisdiction to that at wholesale." (emphasis in original).[7] Here, the plain language of Section 201(f) of the FPA "unambi-

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[6] *See Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)) (stating, "as a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but only those authorities conferred by Congress . . . Thus, if there is no statute conferring authority, FERC has none'").

[7] *New York v. FERC*, 535 U.S. at 17.

guously" excludes[8] *all* of Petitioner's sales from FERC jurisdiction.[9]

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

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[8] *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 911 (9th Cir. 2005).

[9] *Id.* at 918.